A

Mazita Md Khir Johari v Hamdan bin Rasul

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S3–22–790 OF 2000

B MOHD HISHAMUDIN J

20 JANUARY 2008

C *Bankruptcy — Official assignee — Action against — Official assignee entering into agreement with joint owner of bankrupt's property to dispose of bankrupt's share — Aggrieved bankrupt applying for declaration against official assignee — Whether aggrieved bankrupt should have instead appealed to the bankruptcy court — Bankruptcy Act 1967 s 86*

D

Civil Procedure — Judgments and orders — Binding effect — Consent order of the Shariah Court — Whether binding upon official assignee

E *Contract — Void contract — Contrary to public policy — Agreement not in keeping with terms of court order — Whether object of agreement unlawful as being contrary to public policy — Whether agreement unlawful and void — Contracts Act 1950 s 24(d)*

F

Islamic Law — Shariah Court — Enforcement of orders — Consent order relating to disposition of matrimonial property — Whether binding upon official assignee

G

The plaintiff and the defendant were divorced in the Shariah Court. The Shariah Court entered a consent order in respect of the matrimonial home in the following terms: (i) the whole house was to be sold; (ii) the house had to be sold through a real estate agent; (iii) both the plaintiff and the defendant

H had to engage the services of a solicitor for the purpose of the sale and purchase transaction; and (iv) the house had to be sold at the market price. Subsequent to the order of the Shariah Court, the defendant was adjudged a bankrupt and his half share in the house vested in the official assignee. The plaintiff was desirous of purchasing the defendant's half share in the house

I and entered into a sale and purchase agreement ('the agreement') with the official assignee to purchase the defendant's half share. The agreement provided, inter alia, for the plaintiff to pay the purchase price to the official assignee upon delivery of vacant possession of the half undivided share in the house by the official assignee to the plaintiff. The defendant was occupying

the house and despite several notices by the official assignee to the defendant to vacate the house, the defendant refused to do so. The plaintiff thus filed this application in the (civil) High Court for an order to compel the defendant to vacate the house. The defendant responded with a counterclaim for a declaration that the sale and purchase agreement between the plaintiff and the official assignee was void as the agreement contravened the Shariah Court order. The defendant's counsel also submitted that the sale and purchase agreement was contrary to public policy and hence unlawful and void by reason of s 24(d) of the Contracts Act 1950.

Held, dismissing the plaintiff's action with costs and the defendant's counterclaim:

(1) It would not be right for the High Court to order vacant possession of the house as the agreement between the plaintiff and the official assignee was void. The agreement was void because the manner of the sale and the terms of the agreement were not in accordance with the consent order of the Shariah Court. The object of the agreement was therefore unlawful as being opposed to public policy. Hence the agreement was unlawful and void (see paras 11–12).

(2) There was no reason why the official assignee was not bound by the Shariah Court order. If the house was sold in accordance with the order of the Shariah Court, the defendant's half share in the proceeds of the sale would still vest in the official assignee (see para 22).

(3) The defendant's remedy should have been by way of an appeal to the bankruptcy court pursuant to s 86 of the Bankruptcy Act 1967 and not by way of seeking a declaration as was done by the defendant in the instant case (see para 23).

[Bahasa Malaysia summary

Plaintif dan defendan telah bercerai di Mahkamah Syariah. Mahkamah Syariah telah memasukkan perintah persetujuan berkaitan rumah harta sepencarian dalam terma-terma berikut: (i) seluruh rumah itu hendaklah dijual; (ii) rumah itu hendaklah dijual melalui ejen hartanah; (iii) kedua-dua plaintif dan defendan hendaklah melantik khidmat peguamcara bagi tujuan transaksi jual beli itu; dan (iv) rumah itu hendaklah dijual pada harga pasaran. Berikutan perintah Mahkamah Syariah itu, defendan telah diisytihar bankrap dan separuh daripada bahagiannya dalam rumah itu diletakhakkan kepada pegawai pemegang harta. Plaintif berhasrat untuk membeli separuh daripada bahagian defendan dalam rumah itu dan telah memasuki perjanjian jual beli ('perjanjian') dengan pegawai pemegang harta untuk membeli separuh daripada bahagian defendan. Perjanjian tersebut memperuntukkan,

A antara lain, untuk plaintif membayar harga belian kepada pegawai pemegang harta asetelah milikan kosong untuk separuh daripada bahagian yang tidak dibahagikan dalam rumah itu oleh pegawai pemegang harta kepada plaintif. Defendan yang mendiami rumah itu tidak mengosongkan rumah itu meskipun menerima beberapa notis daripada pegawai pemegang harta untuk B berbuat demikian. Plaintif oleh itu telah memfailkan permohonan itu di Mahkamah Tinggi (sivil) untuk perintah mendesak defendan mengosongkan rumah itu. Defendan menjawab dengan tuntutan balas untuk satu deklarasi bahwa perjanjian jual beli antara plaintif dan pegawai pemegang harta adalah tidak sah kerana perjanjian itu bercanggah dengan perintah Mahkamah C Syariah. Peguam defendan juga berhujah bahawa perjanjian jual beli itu adalah bertentangan dengan polisi awam dan justeru itu menyalahi undang-undang dan tidak sah oleh sebab s 24(d) Akta Kontrak 1950.

D

Diputuskan, menolak tindakan plaintif dengan kos dan tuntutan balas defendan:

(1) Ia tidak wajar untuk Mahkamah Tinggi memerintahkan milikan E kosong rumah itu kerana perjanjian antara plaintif dan pegawai pemegang harta adalah tidak sah. Perjanjian itu adalah tidak sah kerana cara jualan dan terma-terma perjanjian adalah tidak menurut perintah persetujuan Mahkamah Syariah. Tujuan perjanjian, oleh yang demikian adalah menyalahi undang-undang kerana bertentangan dengan polisi F awam. Justeru itu perjanjian itu adalah menyalahi undang-undang dan tidak sah (lihat perenggan 11–12).

(2) Tiada alasan kenapa pegawai pemegang harta tidak terikat oleh perintah Mahkamah Syariah. Jika rumah itu dijual menurut perintah Mahkamah Syariah, separuh daripada bahagian defendan dalam hasil G jualan itu masih diletakhakkan kepada pegawai pemegang harta (lihat perenggan 22).

(3) Remedi defendan patut melalui rayuan kepada mahkamah kebankrapan menurut s 86 Akta Kebankrapan 1967 dan bukan melalui H deklarasi seperti yang telah dilakukan oleh defendan dalam kes ini (lihat perenggan 23).]

Notes

For a case on binding effect of judgments and orders, see 2(2) *Mallal's Digest* I (4th Ed, 2007 Reissue) para 4055.

For a case on enforcement of orders in Shariah Court, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) para 667.

For a case on void contract contrary to public policy, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 5524.

For cases on action against official assignee generally, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2688–2707.

Legislation referred to

Bankruptcy Act 1967 ss 24(4), 85(4), 86
Contracts Act 1950 s 24(d)

K Maniam (Skrine) for the plaintiff.
Azhar Arman (Arman Yunos) for the defendant.

Mohd Hishamudin J:

[1] In this writ action the plaintiff seeks an order of this court to the effect that the defendant vacates a house (once the matrimonial home of the parties and now the subject matter of the case) within seven days of the service of the order of the court.

[2] The defendant counterclaims against the plaintiff seeking a declaration that the sale and purchase agreement dated 16 June 1998 entered into between the plaintiff and the official assignee is void.

[3] I have dismissed the plaintiff's action with costs. I have also dismissed the defendant's counterclaim but with no order as to costs.

[4] I shall set out the facts of the case. The plaintiff and defendant were once husband and wife. They are now divorced. On 26 August 1988 the Shariah Court of Kuala Lumpur made the following consent order in respect of the matrimonial home (which is the subject matter of this suit):

> 1 Rumah di alamat No 11, Jalan 1/1, Taman Tun Abdul Razak, Ampang, Selangor adalah harta sepencarian bersama dan hendaklah dijual dan hasilnya dibahagi dua sama banyak. Seorang broker hendaklah dilantik untuk menguruskan penjualan rumah tersebut dengan harga yang paling tinggi bagi menafaat bersama dan kos ditanggung oleh kedua-dua pihak.
>
> 2 Kedua-dua belah pihak hendaklah melantik seorang peguam untuk mengendalikan penjualan rumah tersebut.
>
> 3 [not relevant]

[5] Subsequent to the above order of the Shariah Court, the defendant was adjudged a bankrupt. The adjudicating order and receiving order were made against him by the bankruptcy court on 31 October 1988. He is currently occupying the house (the subject matter of this case) with his present wife.

[6] The house was jointly purchased by the plaintiff and the defendant way back in 20 November 1982 while they were still husband and wife. It became their matrimonial home.

[7] After the defendant was adjudicated a bankrupt, by operation of law (see s 24(4) of the Bankruptcy Act 1967) the defendant's half share in the property (house) vests in the official assignee.

[8] The plaintiff was desirous of purchasing the defendant's half share in the property (house). So after negotiating with the office of the official assignee, on 16 June 1998, she entered into a sale and purchase agreement with the official assignee to purchase the defendant's half share (now vested in the official assignee) in the house. Under the agreement, the purchase price for the half share is RM102,500. Upon signing the agreement, the plaintiff paid a deposit of RM10,250 to the official assignee. The balance purchase price is RM92,250.

[9] One of the terms of the sale and purchase agreement is that the purchase price is to be paid by the plaintiff to the official assignee upon delivery of vacant possession of the half undivided share in the house by the official assignee to the plaintiff.

[10] The official assignee had issued several notices to the defendant asking the defendant to vacate the house, but the defendant refused to do so.

[11] The defendant contends that the sale and purchase agreement entered into between the plaintiff and the official assignee is void as the manner of the sale and the terms of the sale and purchase agreement contravene the terms of the order of the Shariah Court of 26 August 1988. The leaned counsel submits that the sale and purchase agreement is contrary to public policy and hence unlawful and void by reason of s 24(d) of the Contracts Act 1950.

[12] I shall now explain my grounds for dismissing the plaintiff's claim. In my judgment it would not be right for this court to make an order for vacant possession of the house. I so hold because in my view the sale and purchase agreement entered into between the plaintiff and the official assignee is void. The agreement is void because the manner of the sale and the terms of the sale and purchase agreement are not in accordance with the consent order dated 26 August 1988. According to the order of the Shariah Court:

(1) the whole house must be sold;

(2) it must be sold through the service of a real estate agent;

(3) for the purpose of the sale and purchase transaction, both the plaintiff and the defendant must engage the service of a solicitor; and

(4) the house must be sold at the market price.

[13] With regard to limb (1) above, the sale and purchase agreement between the plaintiff and the official assignee only refers to the half share of the plaintiff instead of to the whole house.

[14] With regard to limb (2) above, the Shariah Court's order uses the word:

> Seorang broker hendaklah dilantik …

[15] In my view the word 'broker' here must be interpreted to refer to a real estate agent. In the present case, however, no real estate agent was employed.

[16] With regard to limb (4) above, the Shariah Court order contains the words:

> … dengan harga yang paling tinggi …

[17] These words should be read to mean that the house must be sold at the market price. It should not be read as requiring the house to be sold to 'the highest bidder' as the Shariah Court's order does not decree that the house must be sold by way of public auction or by a public auctioneer. Instead it merely mentions 'broker' which I have interpreted to mean a real estate agent.

[18] In the present case, the defendant's half share is not sold by way of a public auction. However, at the same time, there is no evidence to show that the defendant's half share was sold to the plaintiff under the agreement at the prevailing market price. There is no valuation report prepared by a qualified valuer tendered to court to show the market value of the house at the time the agreement was entered into (15 June 1998). Contrary to the evidence of the plaintiff in Question and Answer 15 of her witness statement, p 60 of bundle A is not a letter from the Valuation Department to the official assignee. It is merely a letter from the official assignee to the plaintiff's solicitors, Messrs Skrine & Co.

[19] Section 24 of the Contracts Act 1950 stipulates:

> 24 What considerations and objects are lawful, and what not
>
> The consideration or object of an agreement is lawful unless —

A (a) …
(b) the court regards it as immoral, or opposed to public policy.
In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

B **[20]** In my judgment, the manner of the sale of the house as well as the terms of the sale and purchase agreement is clearly contrary to the order of the Shariah Court dated 26 August 1988. This being the case, it can be said that the object of the agreement is unlawful as being opposed to public policy. Hence the agreement is unlawful and void.

C **[21]** Learned counsel for the plaintiff submits that the official assignee in dealing with the property of the defendant is not bound by the order of the Shariah Court of 26 August 1988. Counsel relies on s 85(4) of the Bankruptcy Act 1967 which provides:

D (4) Subject to this Act, the Official Assignee shall use his own discretion in the administration of the property of the bankrupt.

[22] With respect I am unable to agree with this view. I see no reason why
E the official assignee is not bound by the order of the Shariah Court. If the house is sold in accordance with the order of the Shariah Court, the defendant's half share in the proceeds of the sale will still vest in the official assignee.

F **[23]** To repeat what has been said at beginning of this judgment, I have also dismissed the defendant's counterclaim. I am in agreement with the submission of learned counsel for the plaintiff that the defendant's remedy should have been by way of an appeal to the bankruptcy court pursuant to s 86 of the Bankruptcy Act 1967 and not by way of seeking a declaration as is done by the defendant in the present case. Section 86 provides:

G *Appeal to Court against Official Assignee*
86 If the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the Official Assignee, he may apply to the Court, and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just.

H **[24]** As I have ruled that the sale and purchase agreement is void, therefore, I am not making any order as to costs in respect of the counterclaim.
Plaintiff's action dismissed with costs. Defendant's counterclaim dismissed.

I Reported by Andrew Christopher Simon